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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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IN THE TEXAS COURT OF CRIMINAL APPEALS AUSTIN, TEXAS

KEDREEN MARQUE PUGH,
Respondent-Appellant
v.
THE STATE OF TEXAS,
Petitioner-Appellee

On the State's Petition for Discretionary Review From The Fourth Court of Appeals, San Antonio Texas
Appellate Cause No. 04-19-00516-CR

Appealed From a Judgment of Conviction From the 187th Judicial District Court Of Bexar County, Texas
Trial Court Cause No. 2018-CR-6053

STATE'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

NO. PD-0546-20

KEDREEN MARQUE PUGH,	§	**IN THE TEXAS COURT OF**
RESPONDENT-APPELLANT	§	
	§	
VS.	§	**CRIMINAL APPEALS**
	§	
THE STATE OF TEXAS,	§	
PETITIONER-APPELLEE	§	**AUSTIN, TEXAS**

STATE'S BRIEF ON THE MERITS

To the Honorable Court of Criminal Appeals:

The law prohibits the use of a defendant's statements against him at trial when they are made pursuant to an interrogation without *Miranda* warnings. Is every question, however, an officer asks an "interrogation?" Specifically, when an officer asks a single question in response to a defendant's ambiguous, voluntary statement, does that question constitute an interrogation for purposes of *Miranda*? To hold that an officer's single, clarifying follow-up question to a defendant's vague, voluntary statement is an "interrogation" is both absurd and in opposition to established case law.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant argument.

STATEMENT OF THE CASE

After Pugh's motion to suppress was denied at trial, he was found guilty of possession with intent to deliver a controlled substance PG 1 4 grams to 200 grams.[1] The court of appeals reversed, finding that the trial court should have suppressed Pugh's statement because of an alleged *Miranda* violation.

ISSUES GRANTED

GROUND ONE: Does a single clarifying question by a police officer in response to a defendant's spontaneous, voluntary statement constitute custodial interrogation for the purposes of *Miranda*?

GROUND TWO: Even if the answer to the officer's question was inadmissible, the court of appeals erred in factoring admissible evidence, including the defendant's initial volunteered statement and the fruit of the un*Mirandized* statement, into its harm analysis.

STATEMENT OF FACTS

Factual Background

Kedreen Marque Pugh, Appellant at the court of appeals, was wanted on a warrant and Detective Joe Rios was assigned to his case as part of the Lone Star Fugitive Task Force.[2] Rios conducted surveillance at Pugh's home and radioed for assistance to take him into custody.[3] Pugh left the residence in his vehicle and officers initiated a traffic stop on the access road of a major highway.[4] Pursuant to

[1] CR at 90.

[2] 3 RR at 22 and 24-26.

[3] 3 RR at 27-28.

[4] 3 RR at 29-30, 32, and 35.

the traffic stop, Pugh was taken into custody on his warrant.[5] After Pugh's apprehension, San Antonio Police Department officer Johnny Lopez and his partner arrived to transport Pugh to SAPD headquarters.[6]

At Pugh's request, Rios agreed to let Pugh's wife come pick up the vehicle Pugh was driving at the time of his arrest.[7] After Pugh's arrest but before he was placed in Lopez's patrol vehicle, Pugh repeatedly asked officers two things—first, for details about his arrest and second, if they could contact his wife about the vehicle.[8] After Lopez left with Pugh, Rios drove the vehicle to a nearby gas station to wait for Pugh's wife.[9] Rios had no intention of searching the vehicle; rather, he intended to release the vehicle to Pugh's wife, or in the alternative, to impound it.[10]

Rios radioed Lopez to get Pugh's wife's phone number to facilitate pick-up of the vehicle and Pugh said to Lopez, "sir, sir, can I tell you something."[11] Lopez,

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[5] 3 RR at 36-37.

[6] 3 RR at 84, 86, and 88.

[7] State's Exhibit A at 7:28-8:31. Because the trial court watched State's Exhibit A in order to make its ruling on the motion to suppress, the State cites to this exhibit in its brief. All time stamps refer to the time when the exhibit is played in Windows Media Player.

[8] State's Exhibit A at 5:20-6:30.

[9] 3 RR at 41-44 and 55-56.

[10] 3 RR at 43-44.

[11] State's Exhibit A at 7:29-7:37.

however, interrupted Pugh to get the requested information and did not follow up on Pugh's statement.[12]

After Lopez provided Rios with the requested information, Lopez told Pugh that Rios would contact his wife and did not discuss anything else with him.[13] Instead, Pugh initiated conversation with Lopez by asking about the warrant and then discussed the activities he had been doing prior to his arrest.[14]

After a lull in conversation, Pugh and Lopez had the following exchange—

Pugh: Officer…

Lopez: Yes sir?

Pugh: Hey, I'm gonna be honest, sir. I—I got stuff in the car, man.

Lopez: What you got in the car?

Pugh: I got drugs in the car and I got a small handgun.[15]

Lopez did not ask Pugh any other questions.[16]

Lopez relayed the information to Rios and Rios responded, "10-4, on COBAN, res gestae?" [17] Pugh then asked if officers had found the gun and drugs

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[12] State's Exhibit A at 7:38-8:31.

[13] State's Exhibit A at 8:32-10:00.q`

[14] State's Exhibit A at 10:00-11:10.

[15] State's Exhibit A at 11:10-11:19.

[16] State's Exhibit A at 11:20-12:05.

[17] 3 RR at 86-88. COBAN is the in-car video recording system used by SAPD. At trial, the State introduced the recordings of the statements made pursuant to Lopez's body-worn camera and not the in-car recording system.

"yet" and subsequently asked if they had a warrant.[18] For the remainder of the car ride, Pugh engaged officers in other conversation, however, he mentioned nothing else about contraband and Lopez asked him no other questions.[19]

Parties' Arguments at Trial

At trial, Pugh moved to suppress his second statement wherein he told Lopez that he had a "drugs" and a "small handgun" in the vehicle.[20] Pugh argued that Lopez's question began an interrogation for which he was not *Mirandized* and the trial court denied the motion to suppress.[21] A jury subsequently convicted Pugh of possession with intent to deliver a controlled substance PG 1 4 grams to 200 grams.[22]

Appellate Court's Reasoning

The court of appeals reversed Pugh's conviction finding that his statement regarding the contents of the vehicle should have been suppressed due to a *Miranda* violation.[23] Specifically, the court found that "Lopez should have known Pugh was going to make some type of incriminating statement, since he 'was going to be

[18] State's Exhibit A at 12:22-12:34.

[19] State's Exhibit A at 12:35-39:12.

[20] 3 RR at 5-13 and 4 RR at 5-9.

[21] CR at 5, 3 RR at 5-13, and 4 RR at 5-9.

[22] 4 RR at 55-56 and CR 90.

[23] *Pugh v. State*, No. 04-19-00516-CR, 2020 WL 1866289, at *2 (Tex. App.—San Antonio Apr. 15, 2020) (mem. op., not designated for publication).

honest with him' about the 'stuff' he had in the vehicle."[24] The court reasoned that, due to Pugh's language, "Lopez should have known asking Pugh what he had in the car would likely elicit an incriminating response."[25] The sum of the appellate court's analysis relied on the language chosen by Pugh to conclude that Pugh's statement was the result of custodial interrogation and should have been suppressed.[26]

Moreover, the appellate court concluded that Pugh's statement about having "stuff" in his car harmed him because it led to the discovery of heroin and a firearm.[27] In addition to the discovery of the drugs, the appellate court pointed out that two out of the three State's witnesses testified to the statement at trial and the State relied on said statement as evidence of possession in closing argument as further evidence of harm.[28]

SUMMARY OF THE ARGUMENT

The court of appeals found that Lopez's single query in response to Pugh's volunteered statement was an "interrogation" for purposes of *Miranda* by evaluating Pugh and Lopez's encounter under the "should know" test. The court of appeals, however, relied only on the language used by Pugh in arriving at its conclusion and

[24] *Id*.

[25] *Id*.

[26] *Id.*

[27] *Id.* at *3.

[28] *Id.* at *3.

ignored other facts relevant to what constitutes an interrogation. Here, the court of appeals's analysis was too narrow in concluding that Lopez should have known any follow-up question to Pugh would solicit an incriminating answer.

While an appellate court has the benefit of both hindsight and a complete record in reaching its conclusion, whether a police officer's question constitutes an interrogation is measured at the time of the encounter between a suspect and police. In this case, the circumstances of the encounter at the time Lopez asked the question do not support a finding that Lopez's question constituted an interrogation either under the "should know" test or a more general, objective evaluation of the encounter. Here, Lopez's question only sought to clarify a vague statement volunteered by Pugh and as such was not custodial interrogation.

ARGUMENT

GROUND ONE: Does a single clarifying question by a police officer in response to a defendant's spontaneous, voluntary statement constitute custodial interrogation for the purposes of Miranda?

Applicable Law: Custodial Interrogation

"The *Miranda* rule generally prohibits the admission into evidence of statements made in response to custodial interrogation when the suspect has not been advised of certain warnings."[29] However, "not all statements obtained by the police after a person has been taken into custody are to be considered the product of

[29] *State v. Cruz*, 461 S.W.3d 531, 536 (Tex. Crim. App. 2015) (internal citations omitted).

interrogation."[30]As such, the "special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation."[31]

Interrogation within the context of *Miranda* means "'any words or actions on the part of the police… that the police should know are reasonably likely to elicit an incriminating response."[32] This "should know" test is evaluated from the suspect's perception and not police intent.[33] "This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police."[34]

Thus, any practice which an officer should know is reasonably likely to elicit an incriminating response from a suspect is considered interrogation.[35] But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the

[30] *Rhode Island v. Innis*, 446 U.S. 291, 299, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)

[31] *Id.* at 300, 100 S.Ct. 1682.

[32] *Cruz*, 461 S.W.3d at 536 (citing *Innis*, 446 U.S. at 300-01, 100 S.Ct. 1682).

[33] *Id.* at 536-37 (citing *Innis*, 446 U.S. at 301, 100 S.Ct. 1682).

[34] *Innis*, 446 U.S. at 301, 100 S. Ct. 1682.

[35] *Id*.

part of police officers that they *should have known* were reasonably likely to elicit an incriminating response."[36]

Application of Law to Present Facts: Officer's Single Clarifying Question was not an Interrogation

In examining the admissibility of Pugh's second, contested statement, the court of appeals incorrectly held that Lopez "should have known" that based on Pugh's preceding statement, his follow-up question would result in an incriminating answer from Pugh. Under either the "should know test" or a more general examination of Pugh and Lopez's encounter, Lopez's single, clarifying question in response to Pugh's volunteered statement does not constitute "interrogation" under *Miranda*.

Evaluating Lopez's Question Pursuant to the "Should Know" Test

Here, the court of appeals held that because Pugh volunteered that he was going to be "honest" and he had "stuff in the car," Lopez should have known that Pugh was likely to make an incriminating statement.[37] In arriving at its conclusion, the court of appeals relied only on the language used by Pugh to support its contention.

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[36] *Id.* at 301–02, 100 S. Ct. 1682 (emphasis in original).

[37] *Pugh*, 2020 WL 1866289, at *2.

The appellate court's analysis, then, ignores other relevant evidence which does not support its ruling—namely, Lopez's limited role as a transport officer and his demeanor during the encounter; the vague nature of Pugh's initial statement and the limited information Lopez knew at the time Pugh made the statement; and the circumstances preceding the statement, including Pugh's apparent desire to unburden himself regarding the contraband. Thus, when evaluating all of the circumstances preceding Pugh's contested statement, and not just the statement itself, the record does not support the appellate court's holding.

Lopez's Role and Demeanor

While Rios surveilled Pugh, followed him, and arranged for his apprehension, Lopez arrived on scene after Pugh's arrest and only to transport him for questioning. Accordingly, Lopez's role was neither to investigate whether a crime had occurred nor to arrest Pugh. Due to Lopez's limited role, he had only minimal information regarding Pugh's arrest and transport. Rather than probing Pugh for additional information, Lopez repeatedly told Pugh that his only job was to transport him and he knew nothing about the circumstances of his arrest. This evidence was relevant as to whether Lopez's question constituted an interrogation but was not addressed by the appellate court.[38]

[38] *See Batiste v. State*, No. AP-76,600, 2013 WL 2424134, at *14 (Tex. Crim. App. June 5, 2013) (not designated for publication) ("While Sgt. Gore's subjective intent is not dispositive in

In addition to his limited capacity as transport officer, Lopez is polite but seemingly unconcerned with matters beyond Pugh's transport. From the start of the car ride, Lopez appears uninterested in anything except transporting Pugh downtown. Not only does Lopez ignore Pugh's initial effort to "tell him something," but he also does not attempt to engage Pugh in any conversation while Pugh is in his custody. Instead, Lopez keeps his questions limited to assisting Rios to facilitate handing off the vehicle to Pugh's wife. At no point during the car ride did Lopez articulate any suspicion that Pugh's vehicle contained contraband or that Pugh was committing an offense independent of being wanted on the warrant.

From Pugh's standpoint, then, Lopez does not seem interested in anything beyond assisting Rios to facilitate pick-up of the vehicle by Pugh's wife and transporting Pugh. Accordingly, it would be unreasonable to conclude that Pugh interpreted Lopez's question as an interrogation. Here, Lopez's limited role as the transport officer and his demeanor during the car ride weigh against a finding that Lopez's question was an attempt to circumvent *Miranda* protections or to interrogate Pugh.

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an *Innis* 'interrogation' analysis, it does shed some light on the situation to the extent it was communicated.").

Pugh's Language and the Limited Information Known by Lopez at the Time Pugh Made the Statement

While the appellate court used Pugh's language as evidence to support its holding, the court failed to consider the ambiguous nature of Pugh's initial statement. Here, Pugh used the word "stuff" to describe what was in his wife's vehicle—a vague term which could have referred to a number of legal items, such as medicine or another item he needed after his arrest.

Moreover, the appellate court interpreted Pugh's statement with the benefit of the entire record and not in context at the time it was made. While it is easy to assume that someone wanting to be "honest" about "stuff" concerns criminal conduct when the case is on appeal, Lopez had limited information at the time Pugh made the statement. When Lopez asked the question, all he knew was that Pugh had been arrested on a warrant and that someone downtown needed to talk to him. Similarly, the extent of Lopez's knowledge about the vehicle was that the vehicle belonged to Pugh's wife and that Pugh was extremely concerned that officers release it to her.

Thus, when evaluating Pugh's vague statement within the context of Lopez's limited knowledge, it is not immediately apparent that Pugh is going to make an incriminating statement. Not only could "stuff" have been referring to something generally legal, but, as Pugh had been insistent to get the vehicle back to his wife, it could have easily referred to something legal that Pugh did not want his wife to find. Given the vague nature of Pugh's statement, the court of appeals's analysis of the

language was too narrow to properly conclude Lopez's single question was an interrogation of Pugh.

Circumstances Preceding Contested Statement

Prior to making the contested statement, Pugh's interactions with officers were not indicative of any concern beyond his arrest and what would happen to his wife's vehicle. In fact, before Pugh made the contested statement, he was discussing mundane topics with Lopez—including the yard work he completed prior to his arrest.

Moreover, the evidence demonstrates that Pugh wanted to unburden himself regarding the illegal contents of the vehicle independent of any questioning by Lopez. First, Pugh tried to tell Lopez something at the start of the car ride, saying "sir, sir, can I tell you something." Later, during a lull in the conversation, Pugh, and not Lopez, initiated the interaction which led to the contested statement. Finally, Pugh volunteered that he had "stuff in the car" without prompting from Lopez.

Further, the circumstances under which the statement was made do not demonstrate that Lopez was interrogating Pugh. Lopez kept his interactions with Pugh brief and limited to securing information needed by Rios or answering Pugh's questions. Rather than following up on Pugh's efforts to tell him something, Lopez simply asked for Pugh's wife's phone number and radioed it to Rios without further

comment. Lopez never questioned Pugh about any other matters and once Lopez clarified what Pugh had in the vehicle, he ceased questioning Pugh.

Thus, the record does not support a finding that Lopez's single, clarifying question in response to Pugh's ambiguous statement regarding the contents of the vehicle constituted "interrogation." Based on the circumstances preceding the statement, it was not immediately clear that Pugh was indicating he had illegal contents in the vehicle or that Lopez was interrogating him regarding same.

When evaluating the entirety of the encounter between Lopez and Pugh from Pugh's perspective, then, the record does not support a finding that Lopez should have known his single question was likely to elicit an incriminating response. From Pugh's standpoint, it is not reasonable to conclude Lopez was interrogating him due to Lopez's limited role, minimal knowledge of Pugh's offense, and Lopez's demeanor during the encounter. Moreover, Pugh's statement was vague—thus, it is reasonable to interpret Lopez's question as an attempt to clarify the statement rather than an interrogation. Finally, it is Pugh, and not Lopez, who keeps the conversation going during the transport and initiates the exchange which leads to the discovery of the contraband. Accordingly, the court of appeals erred in concluding that, under these facts, "what you got in the car" would be interpreted as a coercive inquiry into potentially illegal activity or as an effort to sidestep the requirements of *Miranda*.

Evaluating Lopez's Question Objectively

Even without the application of the "should know" test, Lopez's question does not constitute interrogation. As this Court has recognized, "not all questions that an officer might ask a suspect who is in custody will trigger the *Miranda* requirements."[39] For instance, administrative questions related to the arrest and booking process do not require *Miranda* warnings.[40]

Moreover, numerous cases have found that officers' reflexive or clarifying questions asked in response to defendants' ambiguous or voluntary statements were not the functional equivalent of interrogation—even where it appeared that the defendant was referencing potentially criminal conduct.[41] Here, Pugh made a vague

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[39] *Batiste*, 2013 WL 2424134, at *14.

[40] *Cruz*, 461 S.W.3d at 537.

[41] *State v. Barnes*, 54 N.J. 1, 6, 252 A.2d 398, 401 (N.J. 1969) (police officer asked a defendant, who was arrested on a warrant, "whose stuff is this?" and she admitted to possession of stolen checks); *People v. Huffman*, 41 N.Y.2d 29, 32-34, 359 N.E.2d 353, 356-57 (N.Y. 1976) (police officer asked a defendant "What are you doing back here?" and defendant responded "We were trying to break into that store"); *State v. Lamb*, 213 Neb. 498, 502-03, 330 N.W.2d 464, 465-66 (Neb. 1983) (defendant stated "How would you like it?" and a detective asked "What do you mean by that?" and defendant responded that he had shot his wife); *United States v. Rhodes*, 779 F.2d 1019 (4th Cir. 1985) (defendant told an agent that he could not take a notebook during a search and when the agent inquired as to why, the defendant stated it was necessary for his business); *Colbert v. State*, 654 P.2d 624, 628-29 (Okla. Crim. App. 1982) (deputy asked a defendant if he knew why he had been arrested and brought in and defendant responded, "Yes, I killed [the victim]."); *United States v. Gonzales*, 121 F.3d 928, 939-40 (5th Cir. 1997) (after officers found narcotics and a weapon and the defendant boasted that he had made officers "work for that s——," an officer inquired further and the defendant clarified that he was referring to "the coke and the gun"); *Andersen v. Thieret*, 903 F.2d 526, 531-32 (7th Cir. 1990) (defendant spontaneously admitted to "stab[ing] her" and when police inquired "Who," the defendant identified the victim); *State v. Simoneau*, 402 A.2d 870, 873-75 (Me. 1979) (after defendant stated he wanted to "make a massacre," and the police chief asked "What do you mean, a massacre," defendant replied "I wanted to kill everyone in the family including my father-in-law and brother-in-law"); and *Smith*

statement and Lopez sought to clarify same. Lopez's neutral, follow-up inquiry in response to Pugh's ambiguous, volunteered statement that he "had stuff in the car" is simply a reflexive, clarifying question and not custodial interrogation. Accordingly, the appellate court erred in concluding Lopez interrogated Pugh and the trial court correctly concluded that Pugh's statement "I got drugs in the car and I got a small handgun" was admissible at trial.

GROUND TWO: Even if the answer to the officer's question was inadmissible, the court of appeals erred in factoring admissible evidence, including the defendant's initial volunteered statement and the fruit of the unMirandized statement, into its harm analysis.

Applicable Law and Application of Law to Present Facts: the Appellate Court Erred in its Harm Analysis

The court of appeals also erred in its harm analysis in the instant case. The court of appeals held that "the erroneous admission of Pugh's statement likely was a contributing factor in the jury's deliberations in arriving at a guilty verdict," resulting in harm.[42] In arriving at its conclusion, the court of appeals relied on three facts—first, that the statement led to the search of the vehicle; second, that two of

v. State, 264 Ga. 857, 858-59, 452 S.E.2d 494, 496-497 (Ga. 1995) (after a voluntary call with a detective wherein a defendant offered to turn himself in, the defendant arrived at the police station and a detective asked where the murder weapon was).

[42] *Pugh*, 2020 WL 1866289 at *3.

the three witnesses at trial testified to the statement, and finally, that the State repeatedly referred to the statement as evidence during closing argument.[43]

Even assuming the facts established that Lopez should have known that his single, clarifying question was likely to elicit an incriminating response from Pugh, the court of appeals's holding ignores that Pugh's initial statement that he had something in his vehicle was volunteered. Accordingly, that evidence cannot be included in the court's harm analysis—as it was properly admitted before the jury, relied upon during its case-in-chief, and discussed during closing argument.

Further, the court of appeals's harm analysis incorrectly assumes that the fruits of an un*Mirandized* search are inadmissible. While a "mere violation" of *Miranda* requires that the statement taken in violation of *Miranda* be suppressed, absent coercion, "other evidence subsequently obtained as a result of that statement (i.e. the 'fruits' of the statement) need not be suppressed."[44] Here, the court of appeals misapplied the harm standard in concluding that admission of Pugh's contested statement sufficiently harmed him to necessitate reversal.

Assuming that evidence of Pugh's contested statement should have been excluded, the jury would have heard that—

1. Rios was doing surveillance on Pugh as he was wanted on a warrant;

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[43] *Id*

[44] *Baker v. State*, 956 S.W.2d 19, 22 (Tex. Crim. App. 1997) (internal citations omitted).

2. Pugh was stopped driving a gray Impala;

3. Pugh was arrested on the warrant;

4. Lopez arrived to transport Pugh downtown;

5. Pugh repeatedly asked if his wife could pick up the vehicle and officers agreed;

6. Rios drove the gray Impala to a gas station to wait for Pugh's wife and testified that he had no intention to search the vehicle;

7. Pugh volunteered that he "had stuff in the car;"

8. The Impala was searched;

9. Rios found a handgun and a brown, tarlike substance in the vehicle; and

10. The substance was tested by an analyst from the Bexar County Crime Lab and determined to be 9.937 grams of heroin.[45]

In light of the above evidence and the inferences which a rational jury could make from same, the statement about exactly what was in the vehicle would have had little bearing on the ultimate issue of guilt. Without the contested statement there was still sufficient evidence—that Pugh was driving the vehicle at the time of his arrest, that he voluntarily offered that he had "stuff" in it, and that Rios found a handgun and drugs in the vehicle—on which a rational jury could have convicted him of possession with intent to deliver a controlled substance. Because even under

[45] (3 RR at 25-30, 34-37, 40-44, 55-61, 67-69, 74-76, 83-84, and 88-90, 4 RR at 13, 19-20 and 27-28, and State's Exhibit 3:50-11:15)

the court of appeals's reasoning, the initial statement, the handgun, and the narcotics were still admissible at trial, the court of appeals gave improper weight to the contested statement in concluding that its admission harmed Pugh.

PRAYER

The State of Texas prays that the Court of Criminal Appeals reverse the judgment of the court of appeals and affirm Appellant-Respondent's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I, Jennifer Rossmeier Brown, hereby certify that the total number of words in the State's brief is 4,932. I also certify that a true copy of the above was served on the following on November 25, 2020, in the manner described below:

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